

**Testimony of Honorable Roger Nober
Chairman of the Surface Transportation Board
Before the
House Committee on Transportation and Infrastructure
Subcommittee on Railroads
Hearing on Surface Transportation Board: Agency Resources and Requirements
2:30 p.m., May 20, 2003 Room 2167 RHOB**

Introduction

My name is Roger Nober and I am the Chairman of the Surface Transportation Board. I am pleased to have the opportunity to come before this Subcommittee today to discuss the Board's resources and needs.

This is my first appearance before the Congress as the Chairman of this agency. I was nominated by the President to serve in the position in July 2002, confirmed by the Senate on November 14, 2002, and sworn in as a Board Member and designated as Chairman on November 30, 2002. I am the agency's second Chairman and sixth Board Member.

It is my particular honor that my first testimony be before this Committee, for which I had the honor to work for so many years, and to do so with my longtime friend and colleague, Deputy Assistant Secretary for Budget and Programs Phyllis Scheinberg of the Department of Transportation.

A. Overview of the STB and Summary of Its Core Missions

As all of you know, the Surface Transportation Board was created eight years ago by this Committee in the ICC Termination Act of 1995. The Congress charged it with the fundamental missions of resolving railroad rate and service disputes and reviewing railroad mergers. Structurally, the Congress determined that the Board should be

decisionally independent but administratively affiliated with DOT. Since its inception, the Board has functioned with one-third fewer employees than had been performing those same tasks at the ICC.

I worked for the Members of this Committee when you eliminated the ICC and created the Board, and I am acutely aware of the reasons why Congress took those actions. I believe the Congress created the Board principally to resolve rail rate and service issues and to review mergers, and since I have become Chairman I have focused our agency's resources, staff and energy on these areas.

As I will discuss further, I think the Board faces new challenges in the coming years and will need some modest increase in resources to continue its important work. Before discussing our specific budgetary and resource needs in the future, I would first like to provide an overview of the Board and outline some of my major initiatives in the six months since I became Chairman.

1. Jurisdiction and Structure

The Board provides an efficient and effective forum for the resolution of disputes arising from surface transportation regulation. It serves as both an adjudicatory and a regulatory body. The Board has jurisdiction over railroad rate and service issues and rail restructuring transactions (mergers, line sales, line construction, and line abandonments); certain trucking company, moving van, and non-contiguous ocean shipping company rate matters; certain intercity passenger bus company structure, financial, and operational matters; and certain pipeline matters not regulated by the Federal Energy Regulatory Commission.

Structurally, the Board is comprised of five major offices. The Office of Compliance and Enforcement monitors rail operations throughout the United States and enforces regulations over rail and certain non-rail common carriers in the United States. This office also collects and makes available tariffs from non-contiguous domestic water carriers.

The Office of Congressional and Public Services is the Board's outreach arm. It works with Members of Congress, the public, and the media to answer questions and provide information about the Board's procedures and actions and about transportation regulation more generally.

The Office of Economics, Environmental Analysis and Administration houses several functions. In addition to handling administrative matters, such as personnel and budget, this Office also houses two sections: (1) the Section of Environmental Analysis, which is responsible for undertaking environmental reviews of proposed Board actions in accordance with the National Environmental Policy Act and other environmental laws and making environmental recommendations to the Board, and (2) the Section of Economics, which analyzes rate cases, conducts economic and financial analyses of the railroad industry, and audits Class I railroads.

The Office of Proceedings and the Office of General Counsel provide legal services to the Board. In particular, Proceedings researches and prepares draft decisions, and the General Counsel provides legal advice to the Board and defends Board actions that are challenged in court.

This organizational structure roughly mirrors that which existed at the ICC. Former Chairman Morgan significantly streamlined the Board's structure in recent years, most

notably eliminating the Secretary's office and integrating its functions into the remaining areas. Going forward, I will continue to look closely at all elements of the Board's organizational structure to ensure that we operate as efficiently as possible and that resources are dedicated to the most important functions.

2. Openness

My first administrative priority as Chairman was to ensure that the Board's processes and decisions were open, public and transparent. Throughout my nomination and confirmation process, I heard from many of the agency's stakeholders that they increasingly felt the agency was becoming inaccessible.

Shortly after becoming Chairman, I ended the Board's policy of exclusive notation voting and re-instituted regular public voting conferences. Notation voting – whereby Board Members note their votes by marking “aye” or “nay” on a memo attached to circulated cases – is administratively efficient but does not provide the public the opportunity hear the staff explanation of or Member reasoning behind a decision.

Public voting conferences permit Board staff to explain the decisions and Board Members to comment on important aspects of the cases, including the doctrines raised in them and the rationale for their decisions. We have had three major voting conferences in 2003, the most recent on May 9, where we voted on 21 cases, including two major environmental matters. I still permit notation voting for time-sensitive or minor cases, but as a rule believe that matters should be resolved at public voting conferences.

I have also ensured that the Board fully include public hearings and oral testimony when it conducts an administrative rulemaking. The Board has always conducted public hearings on the most significant matters. On many other subjects, however, it often first issued written Board proposals, and then sought public written comment before issuing a final rule.

I believe that the Board should generally hold public hearings on the subject of the rulemaking before we issue our draft notice of proposed rulemaking containing our specific proposals. After we issue our draft notice of proposed rulemaking, it will be followed-up with another public hearing seeking comment on our specific proposals. Only after considering all of this input will final rules be issued. Of course, there will always be minor matters for which this process is unnecessary. But as I will discuss shortly, this model need not take more time and proved very successful when we recently looked at the Board's procedures governing large rate cases.

Finally, I have indicated to all of the Board's stakeholders that as Chairman, I am committed to maintaining the Board's tradition of being fair, open-minded and accessible. I have invited all interested stakeholders to meet with me, and I am pleased with the community's responsiveness to my invitation.

3. Simplifying Large Rate Cases

Currently, the Board's most pressing time and resource challenge is resolving all pending rate cases within the nine-month statutory deadlines set by Congress. A large rate case is a proceeding where a shipper challenges the reasonableness of a common carriage rate it is charged by a railroad. Over the past two decades, these have virtually

always been for large shipments of coal where million of dollars are at stake. Our agency currently has twelve pending large rate cases, which is the highest number in its history. To put the twelve cases in perspective, our normal workload is two to three pending rate cases at any one time.

Now I am frequently asked why a total of twelve cases is straining the Board's capacity, when other federal regulatory agencies may have hundreds or even thousands of rate cases pending at any one time. The answer lies in the time, complexity and unique analytical requirements of the stand-alone cost (SAC) method we must utilize for resolving maximum rate cases within their statutory deadlines, while at the same time resolving the hundreds of other matters we adjudicate.

By way of background, the Board's jurisdiction to consider whether the common carrier rate a railroad charges its customer is reasonable is limited to situations where the railroad has market dominance over the shipper. If the rate the railroad charges the shipper results in a revenue to variable cost ratio that is greater than 180 (a threshold created by statute) and is not otherwise constrained by competitive, market forces (such as a viable alternative means of transportation), the railroad is presumed market dominant and the Board has jurisdiction to take the next step and consider the reasonableness of the rate.

To determine whether the rate is reasonable, the Board employs the SAC test, in which the railroad and shipper submit evidence on the construction and operation of an optimally efficient hypothetical railroad designed to serve the shipper and other traffic the shipper chooses. By comparing the revenue and costs of this hypothetical railroad, the Board determines the maximum reasonable rate the railroad may charge the shipper.

SAC cases take two to three years to resolve, and can cost the shipper \$2-3 million to prosecute and a railroad \$5 million or more to defend. In order for our agency to rule on them, our Office of Economics must spend thousands of staff hours evaluating almost every technical aspect of building and operating this hypothetical railroad, which are set forth in factual records thousands of pages long. Final decisions are prepared by staff teams drawn from our Offices of Proceedings, General Counsel and Economics.

My first substantive priority as Chairman was to find ways to reduce the time, cost and complexity of these maximum rate cases. In February, we held a hearing on our large rate case procedures, and received oral testimony from ten parties, including DOT, most major shipper groups and major railroads. Based on that hearing, we implemented several new procedures to streamline large rate cases. Our new requirements include a mandatory mediation period at the onset of a case, regular discovery conferences with Board staff, public as well as confidential versions of all filings, technical conferences to resolve factual issues and faster resolution of discovery motions filed before the Board.

We were able to issue our final rules within six weeks of our hearing, and we hope that these revised procedures will reduce the cost, complexity and time it takes to resolve the rate cases currently pending. However, I would like to note that most of these solutions entail greater staff involvement and therefore a larger investment of agency resources in these cases.

4. Small Rate Case Procedures

My second substantive priority is to address perhaps the most vexing issue facing the Board – the concern of small-sized shippers or shippers who ship in small quantities who

feel they are unable to bring a rate case before the Board. While the Board has statutory responsibility to determine the reasonableness of rail rates, there have only been two non-coal rate cases brought in the last 20 years, and the last rate case that could be considered “small” was brought in 1991. Maybe this is because there are no shippers who feel they are being charged unreasonable rates, or maybe it is because there is something in the way our agency’s rules and procedures are structured that discourages shippers from bringing such cases.

It is well settled that the SAC method is too lengthy, expensive and difficult to use for a small rate case. And for many years the community has struggled to find an appropriate alternative method. Back in 1995, Congress directed the Board to complete and publish streamlined rules for small rate cases, meaning cases for which a full SAC analysis would be too expensive. These rules were finalized in 1996. Ironically, even though no case has ever been brought under them, they have already been challenged in court.

We recently held a hearing on this subject and received testimony from DOT, 14 shipper groups, the railroads and a labor union. The shipper witnesses offered several reasons for why no cases have been brought under the 1996 rules, and a number of constructive suggestions on how to improve them. I hope to adopt most, if not all of the shippers’ procedural suggestions, and am confident that those proposals, together with additional ideas, will produce some real progress in this area.

I feel strongly that shippers who feel they have been charged an unreasonable rate have a right to have that complaint heard by the Board in a fair, impartial, expeditious

and economical manner. That is part of our fundamental charge from the Congress. That is not the case now, and our agency can and will offer some solutions to that problem.

B. Board Resources and Needs

As an adjudicatory agency, our budget is primarily personnel and therefore relatively stable from year to year. Over 80% of our budget is for salaries and expenses, and an additional 10% is for rent and security costs, both of which are essentially fixed.

1. Budgetary Needs

In the current fiscal year, FY 03, our agency has a budget of \$19,320,000 and a target employment level of 145 FTEs. This was the level sought by our agency for FY 03. As you are aware, the Board has budgetary by-pass authority, and in FY 03 as in prior years, the level sought by the Board has been the same as the level proposed by the President in his annual budget. Importantly, the fiscal year 2003 Transportation Appropriations Act allows, as past acts have, collections for fees charged by the STB to be deposited into the Treasury to offset our annual appropriation.

In FY 03, our budget of \$19,320,000 breaks down as follows:

Compensation and Benefits	\$14,716,000	
Travel	\$78,000	
Rent & Utilities	\$1,774,000	
Services, Subscriptions, Printing		
<u>Training, Repairs, Supplies, etc.</u>	<u>\$2,752,000</u>	
Gross total	\$19,320,000	
<u>Estimated user fees collected</u>	<u>\$ 1,000,000</u>	(\$840,000 collected to date)

In FY 04, our agency has requested a budget of \$20,516,000 in its independent submission to Congress. However, our budget request is different than the President's

budget submission for the STB for FY 04, which remained at the FY 03 level.* The differences between the President's Budget and the Board's submission for FY 04 are as follows, \$446,000 for estimated pay raises (not included in the President's Budget for any executive branch agency) and \$549,000 in new programmatic initiatives, most importantly three additional FTE's to form a new rate case analytical team to deal with the extensive number of rate cases currently pending and those expected to be filed in the coming years.

For FY 04, the Board's independent budget request of \$20,516,000 breaks down as follows:

Compensation and Benefits	\$15,574,000
Travel	\$80,000
Rent & Utilities	\$2,041,000
Services, Subscriptions, Printing	
<u>Training, Repairs, Supplies, etc.</u>	<u>\$2,821,000</u>
Gross total	\$20,516,000
 <u>Estimated user fees collections</u>	 <u>\$1,050,000</u>

While I am mindful of the need for fiscal restraint, as I will explain below it is important that the Board obtain the additional resources necessary to form a new rate team. And since over ninety percent of our budget is fixed costs in salaries, expenses and rent, we would have a more difficult time than many agencies funding the full cost of the executive branch pay raise out of our existing funding levels.

* The Board's enacted FY 03 Appropriation was \$19,521,000, the same level requested by the President in his FY04 Budget request. However, the \$19,521,000 level does not reflect the Board's share of the rescission from the government-wide across-the-board cut contained in the FY03 supplemental appropriations act, which reduced the Board's FY 03 actual budget by \$201,000 to the level discussed of \$19,320,000.

2. Employment Needs

To put our current employment needs in context, I would like to begin with a bit of history. Before the ICC was eliminated, over 200 employees had been performing the substantive functions currently administered by the Board. But when the Board was created, it had only been given funding sufficient to pay 135 employees, so our agency retained and carried out its mission with 135 employees. Included within the 135 FTE's were about a dozen administrative and support staff. The 135 FTE level did not change until FY 00, when the level was increased to 140 FTE's.

As I previously mentioned, for FY 03 we currently have a target employment level of 145 FTE's. As of this morning, we have 141 actual employees at the Board. We currently have six vacancies in the two other Commissioner's offices as well as two other vacancies Board-wide. Should we fill all these positions, we would still be below our cap of 145 FTE's for FY 03, since many employees were hired during the year, left before the end of the fiscal year or work part time. However, for FY 04, we would have a more difficult time staying within a 145 FTE cap.

For FY 04, we have requested three additional FTE's to form a new rate analysis team. These additional positions are critical to our ability to meet the statutory deadlines set by Congress for resolving rate cases while timely resolving the hundreds of other matters in our extensive docket. It is my judgment that the current elevated number of rate cases reflects a ramp, rather than a bulge of filings, and that we must have additional staff to resolve them. Should this prediction turn out to be wrong, we would still have trained a new rate team to take over when our existing first team retires in the next few years. It is a prudent action in any event.

Beyond FY 04, we anticipate needing additional resources for a few more FTE's to improve our ability to process large and small rate cases. After we complete our proceeding on small rate cases, I expect that the Board will begin processing that type of case. In particular, I believe the Board should hire an Administrative Law Judge to help resolve any small rate cases that may be brought, as well as more quickly resolve the discovery disputes that occur in large rate cases. The Board may also seek to create an office of special counsel to help address questions asked by and facilitate the resolution of issues raised by small shippers. Both of these actions were suggested by many parties at our recent hearing.

Beyond these few targeted needs for additional personnel, I believe that through my ability as Chairman to re-assign personnel and normal attrition, we can meet any other needs. For example, last winter I transferred several employees with appropriate skills from our Office of Compliance and Enforcement to our Office of Economics on a long-term basis to help resolve rate cases.

3. Overall Workload

While up to this point I have focused on rate cases, I want to emphasize that our agency handles hundreds of other matters each year, many of them significant in their own right. For example, the development in recent years of a sizeable and strong short line railroad industry has resulted in many matters regarding line sales. Railroads and shippers alike have brought competition into markets by seeking authority to construct new rail lines. As railroads evaluate their networks, we have had many abandonment

cases. As a result, our responsibility for conducting environmental review processes has significantly expanded the Board's workload.

Over the past several years, our adjudicatory workload briefly dipped and is now rising again, with 903 Board decisions and court-related matters in FY 00; 871 in FY 01, 890 in FY 02 and an estimated 1,041 in FY 03. What has changed is our mix of work, with merger and merger related matters occupying a smaller percentage of our matters, and rate, service, licensing and environmental matters a proportionally larger share.

However, there is one factor that could alter all of these estimates, and that is if we are presented with a major railroad merger application. A transcontinental merger proceeding, with its accompanying statutory deadline, would consume an unprecedented level of Board resources. If combined with our current high level of rate cases, we would face a significant challenge resolving all of these matters within the statutory deadlines set by Congress.

4. Workforce Demographics

Since I have become Chairman, I have made hiring new employees a priority. Sixty-six percent of the Board's staff is over the age of fifty; only twenty-two percent, including me, are under the age of 40. We have early retirement authority, and fifty-eight percent of our staff is eligible for voluntary or early retirement. In five years, the situation will be worse, when sixty-six percent – or two-thirds – of our staff will be eligible for retirement.

To put these statistics in perspective, at DOT approximately thirty-two percent of the workforce is eligible for early or voluntary retirement, and the average for the federal

workforce as a whole is thirty percent. We face a significant challenge to retain a trained workforce.

Since so much of our staff have specific, technical expertise in sometimes arcane areas, hiring and training newer workers is imperative. Since I have become Chairman, we have brought on twelve new employees, and I hope to hire several more before the end of the fiscal year.

5. Upcoming Space Needs

In the ICC Termination Act, Congress directed that the Board move from the old ICC building on Constitution Avenue to new space. In 1997, the Board moved into its current space at 1925 K Street. This lease has provided the Board with exceptional space at rates well below market. However, our lease expires in 2007, and the building owners have indicated that they will “redevelop”, i.e., tear down, our existing building and so we will need to move at that time.

We are currently working with GSA on our space needs to develop a proposal for a new lease. We expect that GSA will request authority from this Committee in calendar year 2004 to procure sufficient space to house the Board beginning in 2007. We anticipate that our current rent payments, which are approximately \$1.6 million per year, will more than double at that time.

C. Relationship with the Department of Transportation

When Congress created the Board back in 1995, it envisioned an agency that would be decisionally independent, but administratively affiliated with the Department of

Transportation. This was a new type of relationship, and one that needed to be developed by the then-Chairman of the Board Linda Morgan and the then-Secretary of Transportation Federico Peña.

Since the creation of the Board, there has been no question about the independence of the Board with respect to its substantive decisionmaking. And after a brief period of adjustment, the relationship between the Board and DOT on administrative matters has been generally good. Currently, the Board has independent discretion over most administrative areas, including hiring and firing of employees and entering into procurement and consulting contracts, such as rent.

Since I became Chairman, I have been pleased with the Board's current administrative relationship with DOT. In fact, I believe the functional relationship between the Board and DOT has never been better. I particularly want to thank DOT for helping us on several security issues. DOT aided us in locating off-site COOP space in case of an emergency – we will co-locate with FRA – at a cost to the Board that is 90 percent lower than we could obtain on our own. They also facilitated my obtaining a secure telephone unit so that we can communicate in case of emergency. We could not have done either on our own.

D. Authority to Act as a Single Member

The last matter I would like to raise is a novel one for the Board and for independent agencies in general, that is the ability of the Board to function with only one Member. As all of you are aware, the Board is a three-member body, where at least one of the Members must be from each political party. When I became Chairman at the end of

November, the Board had a full complement of Members. In March, Vice Chairman Wayne Burkes left to pursue a run for the office of Treasurer of the State of Mississippi. Just last Thursday, Commissioner Linda Morgan left the Board after nine years of service, leaving me as the only Board Member.

It is my opinion and the opinion of our General Counsel that I have the power to act on behalf of the Board as its only Member. While I have the legal power to act as a single member, whether I *can* act and whether I *should* act are different matters.

I will have these concerns in mind when I consider what actions to take as a single member. It is my hope that new Board Members will be nominated and confirmed quickly, before the August recess. On the one hand, I am mindful that Congress created the Board as a bi-partisan, multi-member Board so that its decisions would reflect consensus among different points of view. Congress could have, and of course did not, create a unilateral decisionmaker. On the other hand, the industry must have an agency that can continue to function.

Conclusion

The Board is a unique agency with a focused mission. As I am fond of saying, while the breadth of stakeholders that care about what we do may be an inch wide, their depth of feeling is a mile deep. To those who are concerned with the decisions of the Board, we are the most important federal agency, and perhaps the most important outside entity of all.

I am committed to ensuring that the Board carries out the missions in the most fair and efficient manner. I am mindful that we are a public agency, and like all public

agencies must do our business fairly, efficiently and in full public view. I look forward to working with the Members of this Subcommittee and Committee, the Congress and the Board's stakeholders to best resolve the important issues that come before us.

This concludes my written testimony, and I look forward to answering any questions you might have.